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IN THE COURT OF APPEALS OF INDIANA

IN RE: THE MARRIAGE OF WILLIAM G. HUNERT,	)	
Appellant-Respondent,	)	
vs.	)	No. 14A04-0709-CV-516
SHERRY M. HUNERT,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE DAVIESS CIRCUIT COURT
The Honorable Gregory A. Smith, Judge
Cause No. 14C01-9912-DR-449

June 27, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

William G. Hunert appeals the trial court's Order on College Expenses, requiring him to contribute $5,687.42 toward his daughter's first year of college. We restate the issues raised by William as: 1) whether the trial court's determination of William's income is clearly erroneous; and 2) whether the trial court's apportionment of William's daughter's college expenses is clearly erroneous. Concluding that neither the trial court's determination of William's income nor its apportionment of his daughter's college expenses is clearly erroneous, we affirm.

Facts and Procedural History

On February 20, 2000, the marriage of William and Sherry Hunert was dissolved. During the marriage, the Hunerts had one child (the "Daughter"). During her senior year of high school, the Daughter applied and was accepted to a state university. The estimated cost of attending the university for one year is $18,268. Daughter applied for and received a scholarship in the amount of $1,000 per year, work-study in the amount of $1,500 per year, a university grant in the amount of $3,000 per year, and an East O'Bannon grant in the amount of $614 per year. Thus, the estimated cost of attending school for the first year, minus Daughter's contributions, is $12,154. Sherry asked William to contribute to Daughter's education, but William refused, stating his belief that he should not have to bear the burden of paying for Daughter's college, as "when you're eighteen, you're an adult, you should take care of yourself," transcript at 8 (testimony of William), and that he "really think[s] [he] shouldn't have to pay anything, because

basically [he is] being discriminized [sic] because of [his] marital status," id. at 20.[1] On May 14, 2007, Sherry filed a Petition to Apportion Payment of College Expenses and Modify Support. On July 20, 2007, the trial court held a hearing on this petition. At this hearing, William testified that although he had earned over $60,000 in 2003 and 2004 as an owner of a real estate appraisal business, his earnings had decreased to $43,250 in 2005, $1,000 in 2006, and $2,400 in 2007 as of the date of the hearing. Sherry works as a pilot and makes $961 per week. On August 7, 2007, the trial court issued its order along with the following relevant findings:

> 4. That both parties acknowledge they are proud of [Daughter] and both agree she has demonstrated the aptitude and ability to pursue a college degree.
> 5. That [William] believes that any child 18 years of age or older should make their [sic] own way and pay their [sic] own post secondary education costs with little or no financial help from the parents and disagrees with long established Indiana case law that holds a parent in a dissolution or paternity case may be ordered to contribute to the child's post secondary education.
> ***
> 8. [William's] business income has declined as an appraiser . . . due to a slowing down in the real estate market in the past several years.
> 9. That the Court recognizes that there has been slowing in the real estate market but does not find that the income of [William] has declined to $2400 or less per year from an approximate salary of over $60,000 in 2003 and 2004.
> 10. That [William] is current on his two existing mortgages and on his current support order and still continues to employ an office manager and to employ his wife at approximately the same salary as the last several years as well as other employees who act as appraisers in his business, and he anticipates an upturn in his business, and he did not seek a support modification in the past three years.

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[1] Our supreme court has held that statutes allowing a trial court to require a divorced parent to contribute to his or her child's college expenses are not unconstitutional. Neudecker v. Neudecker, 577 N.E.2d 960, 962 (Ind. 1991).

> 11. That there are private and government student loans for parents to assist with the college expenses of children.
> ***
> 13. That [William's] gross income should be imputed to him at a minimum at between his 2005 level of $43,250 which equals $831 gross income per week and his 2004 income level of $66,421.00.
> 14. The . . . mean level [is] $54,834.50 which equals $1,055 gross income per week.
> 15. That [Sherry's] gross income is $49,972 per year or $961 per week gross.
> ***
> 21. Therefore, the Court finds that given the economic earning capacity of both parents [Daughter] should not be required (however she may if she wishes to do so) to bear the burden of any student loan debt at this time.

Appellant's Appendix at 4-6. The trial court then concluded that Sherry had 49% of the total weekly income, and William had 51%, and ordered William to pay $5,700 to Daughter's university no later than October 1, 2007, and for each of the next five years, unless Daughter has earned her degree or failed to maintain a 2.2 grade point average.[2] William now appeals.

Discussion and Decision

Initially, we note that the trial court, apparently sua sponte, issued findings and conclusions along with its order. Although we discuss the applicable standard of review governing the issues raised below, we also note the general standard of review applied to cases in which the trial court has issued such findings and conclusions.

> In reviewing the judgment of the trial court, we must first determine whether the evidence supports the findings, and second, whether the

[2] In reaching its ultimate figure, the trial court gave William a $31 per week deduction for a health insurance premium paid by William, and added an additional weekly support obligation of $21 per week because of the time that Daughter will spend at Sherry's home. William does not raise any challenge to these aspects of the trial court's Order.

> findings support the judgment. The findings and judgment will not be set aside unless they are clearly erroneous. Findings of fact are clearly erroneous when the record lacks any evidence or reasonable inferences from the evidence to support them. A judgment is clearly erroneous when it is unsupported by the findings of fact. In determining whether the findings or judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom. Moreover, we will not reweigh the evidence or assess witness credibility.

Deckard v. Deckard, 841 N.E.2d 194, 199 (Ind. Ct. App. 2006) (quoting Daugherty v. Daugherty, 816 N.E.2d. 1180, 1183 (Ind. Ct. App. 2004) (citations omitted)).

I. Determination of William's Income

We will not reverse the trial court's calculation of a parent's income unless its finding is clearly erroneous.[3] Eppler v. Eppler, 837 N.E.2d 167, 173 (Ind. Ct. App. 2005), trans. denied. "If the trial court's income figure includes the income required by our Child Support Guidelines and 'falls within the scope of the evidence presented at the hearing,' the trial court's determination is not clearly erroneous." Naggatz v. Beckwith, 809 N.E.2d 899, 903 (Ind. Ct. App. 2004) (quoting Ratliff v. Ratliff, 804 N.E.2d 237, 244 (Ind. Ct. App. 2004)), trans. denied.

[3] William cites Schaeffer v. Schaeffer, 717 N.E.2d 915, 917 (Ind. Ct. App. 1999), in stating the applicable standard of review is abuse of discretion. Our review of our caselaw indicates the "clearly erroneous" standard is the correct standard to use when making this determination. See McGinley-Ellis v. Ellis, 638 N.E.2d 1249, 1251 (Ind. 1994). However, we note that here, the distinction is not a determinate factor in our decision. Cf. MacLafferty v. MacLafferty, 829 N.E.2d 938, 940 (Ind. 2005) ("Whether the standard of review is phrased as 'abuse of discretion' or 'clear error,' this deference is a reflection, first and foremost, that the trial judge is in the best position to judge the facts, to get a feel for the family dynamics, to get a sense of the parents and their relationship with their children—the kind of qualities that appellate courts would be in a difficult position to assess."); Borum v. Owens, 852 N.E.2d 966, 969 (Ind. Ct. App. 2006) ("Whether the standard of review is phrased as 'abuse of discretion' or 'clear error,' the importance of first-person observation and avoiding disruption remain compelling reasons for deference.").

Here, the trial court recognized that William's business had suffered during the last two years. However, it declined to find that William's business had suffered to the extent that his earnings decreased by roughly 96%. Instead, the trial court decided to impute income to William, taking an average of his earnings in 2004 and 2005. Whether or not to impute income is a fact sensitive inquiry. Cf. Ind. Child Support Guideline 3, Comment 2(d) ("Whether or not income should be imputed to a parent whose living expenses have been substantially reduced due to financial resources other than the parent's own earning capabilities is also a fact-sensitive situation requiring careful consideration of the evidence in each case."). We believe the trial court's decision to do so was neither clearly erroneous nor an abuse of discretion.

Although William claims that he had made only $1,000 in 2006, and $2,400 in the first half of 2007, these figures are clearly aberrations from William's typical earnings. The trial court specifically found that William's income had not decreased to such an extent as William claimed. This finding involves the trial court's assessment of William's credibility, and we will not second-guess the trial court in this assessment on appeal. See Burke v. Burke, 809 N.E.2d 896, 898 (Ind. Ct. App. 2004) (recognizing that we do not judge witness credibility or reweigh the evidence, and that we will not disturb the trial court's determination "even though we may have reached a different conclusion").

There was evidence introduced that tended to support the trial court's conclusion that William's income had not decreased to the extent that he claimed. It appears that William's personal 2006 tax return indicates that his company made $27,000 that year.

William testified that he actually received only $1,000 in salary, plus "probably eight to ten thousand in loans," tr. at 25, that "meals, you know, fifty percent of that is, also, considered income and that's, also, part of that [$27,000] figure," id., and that he receives "mileage reimbursement – that's not pay, that's reimbursement for wear and tear," id. at 25-26. As the Guidelines explain, when dealing with the self-employed, "benefits that reduce living expenses . . . [including] reimbursed meals . . . should be included in whole or in part." Child Supp. G. 3, Comment 2(a). Our supreme court has explained that this section of the Guidelines "was adopted in recognition of the fact that the self-employed and those in analogous situations often have an ability to control the structure and amount of their own compensation." McGinley-Ellis, 638 N.E.2d at 1252. Therefore, it appears that William's calculation of his income in 2006 and 2007, discounting money he received for meals, travel, and other expenses that reduce the cost of living, may not be as comprehensive as that envisioned by the Guidelines. Cf. id. at 1252-53 (holding the trial court erroneously calculated a business-owner's income where the trial court treated him "as an employee of [the company], not the president/majority stockholder in complete control over his compensation as well as every other operational aspect of the business" (quotations and citation omitted)).

Further, with regard to the success of his business, William testified he is "anticipating it'll get better," and that the appraisal business "traditionally, has ups and downs, and we're at a down period, and hopefully we'll have an up period." Tr. at 35. The Guidelines and our case law make clear that a parent's salary or income on the date of the hearing is not the sole consideration when determining a parent's ability to pay

support or contribute to college expenses. See Child Supp. G. 3, Comment 2(c)(4) ("If [an] involuntary layoff can be reasonably expected to be brief, potential income should be used at or near that parent's historical earning level."); Vagenas v. Vagenas, 879 N.E.2d 1155, 1161 n.2 (Ind. Ct. App. 2008) (holding the trial court did not improperly impute income to mother, noting that although the mother's business was not currently making a profit, "she is hopeful that her new business will start making a profit in the near future"). In sum, we conclude the trial court's determination of William's income for purposes of apportioning Daughter's college expenses is within the evidence and is not clearly erroneous.

II. Apportionment of College Expenses

"Although a parent is under no absolute legal duty to provide a college education for his children, a court may nevertheless order a parent to pay part or all of such costs when appropriate." Claypool v. Claypool, 712 N.E.2d 1104, 1109 (Ind. Ct. App. 1999), trans. denied. "We review a trial court's apportionment of college expenses for clear error," and "will affirm the judgment unless it 'is clearly against the logic and effect of the facts and circumstances which were before' the court." Marriage of Hensley v. Hensley, 868 N.E.2d 910, 913 (Ind. Ct. App. 2007) (quoting Carr, 600 N.E.2d at 945).[4]

[4] William again seems to argue that an abuse of discretion standard should govern. Our supreme court has explicitly held "when the apportionment of college expenses is at issue, the clearly erroneous standard . . . governs appellate review." Carr v. Carr, 600 N.E.2d 943, 945 (Ind. 1992); see also Marriage of Hensley, 868 N.E.2d at 913 ("We review a trial court's apportionment of college expenses for clear error."); Claypool, 712 N.E.2d at 1109 ("When the apportionment of college expenses is at issue, the trial court's judgment will be affirmed unless it is clearly erroneous."). William does not appear to challenge the fact that the trial court chose to award college expenses at all, a decision that we do review for an abuse of discretion, see Carr, 600 N.E.2d at 945 (holding that although review of "apportionment of

We will not reverse unless "a review of the record leaves this court with a firm conviction that a mistake has been made." Carson v. Carson, 875 N.E.2d 484, 485 (Ind. Ct. App. 2007).

In ordering an award of expenses for post-secondary education, a trial court should consider:

> (A) the child's aptitude and ability;
> (B) the child's reasonable ability to contribute to educational expenses through:
> (i) work;
> (ii) obtaining loans; and
> (iii) obtaining other sources of financial aid reasonably available to the child and each parent; and
> (C) the ability of each parent to meet these expenses.

Ind. Code § 31-16-6-2. The Guideline's commentary elaborates:

> [T]he court should consider post-secondary education to be a group effort, and weigh the ability of each parent to contribute to payment of the expense, as well as the ability of the student to pay a portion of the expense.
>
> If the Court determines that an award of post-secondary educational expenses is appropriate, it should apportion the expenses between the parents and the child, taking into consideration the incomes and overall financial condition of the parents and the child, education gifts, education trust funds, and any other education savings program. The court should also take into consideration scholarships, grants, student loans, summer and school year employment and other cost-reducing programs available to the student.

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college expenses" is governed by the clearly erroneous standard, "the decision to order the payment of extraordinary educational expenses" is reviewed for an abuse of discretion (emphasis added)); Howe v. Voninski, 698 N.E.2d 380, 381 (Ind. Ct. App. 1998) ("Upon appeal, this court will not reverse an order providing for the educational needs of a child absent an abuse of discretion."). Instead, he challenges only the apportionment of the expenses of Daughter attending college, an issue, which, under Carr, is reviewed under the clearly erroneous standard. However, as in our resolution of the issue of the trial court's determination of William's income, we do not believe the outcome of this case would be different under a review for abuse of discretion. See supra, note 3.

Child Supp. G. 6, Comment, Extraordinary Educational Expenses (b).

In determining "what the child may reasonably be expected to contribute, the trial court should take heed of the difference between non-reimbursable financial aid, such as scholarships and grants, and student loans, which place a financial burden on the child." Claypool, 712 N.E.2d at 1109; see also Gilbert v. Gilbert, 777 N.E.2d 785, 794 (Ind. Ct. App. 2002). We have explicitly recognized that in certain situations "the trial court may find that the child cannot be reasonably expected to contribute anything to his college expenses beyond non-reimbursable funding such as scholarships and grants." Claypool, 712 N.E.2d at 1109 n.7; see also Gilbert, 777 N.E.2d at 794.

Here, Daughter is contributing roughly one-third of the expense of her college education through scholarships, grants, and work-study. She is attending a public university, and not a more expensive private school. See Child Supp. G. 6, Comment, Extraordinary Education Expenses (b) (permitting the trial court to "limit consideration of college expenses to the cost of state supported colleges and universities"); cf. Quinn v. Threlkel, 858 N.E.2d 665, 671 (Ind. Ct. App. 2006) ("The trial court's order also makes no mention of the fact that [the child] is attending a private college and the much higher expense that entails."). The trial court decided to apportion the remainder of the expense in accordance with William and Sherry's incomes, requiring both to contribute roughly one-third of the expense. Although we recognize that William now argues that he does not have the ability to pay for Daughter's education expenses, it appears that his position prior to the hearing was merely that he did not believe he should be required to pay for Daughter's college education. See tr. at 55 (Sherry testifying that when she approached

William about paying for Daughter's college, William's financial ability, or lack thereof, to pay "wasn't even brought up"); id. at 56 (Sherry testifying that "there was no, you know, I was doing well, I'm not doing well now. There was more of it's eighteen, that's it"). This evidence could have supported a reasonable inference that William is not particularly concerned about his financial ability to comply with the trial court's order and is against paying for Daughter's college based primarily on theoretical objections to supporting children older than eighteen.

Similarly, we find inapt William's comparison of himself to the father in Henlsey, who felt the only way he would be able to comply with the trial court's order regarding payment for college expenses would be if "$50 bills come out of the sky," 868 N.E.2d at 916. In Hensley, the trial court ordered the father to not only be responsible for roughly 86% of the child's college education expenses, but also to reimburse the mother for over $60,000 in past tuition. We noted that although the mother suggested the father could take out a PLUS loan,[5] there was no indication that the father could do so, as the daughter's tuition had already been paid, and PLUS loans are disbursed to the school, and not directly to the parent. Id.; see also http://studentaid.ed.gov/PORTALSWebApp/students/english/parentloans.jsp (indicating that the lender sends the loan funds to the school and that the "yearly limit on a PLUS loan is equal to [a student's] cost of attendance minus any other financial aid") (last

[5] PLUS loans are government loans available to parents to help them pay for their dependent's college education. See http://studentaid.ed.gov/PORTALSWebApp/students/english/parentloans.jsp (last visited May 14, 2008).

visited May 14, 2008). Here, there is no requirement that William reimburse Sherry for any expenses, and we note, as did the trial court, that William very well could be able to take out government loans to satisfy his obligation under the trial court's order.[6]

Having reviewed the trial court's order and the surrounding circumstances, we do not find either the trial court's decision to not require Daughter to take out loans at this time[7] or its overall apportionment of her college expenses to be clearly erroneous. See Gilbert, 777 N.E.2d at 795.

Conclusion

We conclude that neither the trial court's determination of William's income nor its apportionment of Daughter's college expenses is clearly erroneous.

Affirmed.

BAKER, C.J., and RILEY, J., concur.

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[6] We recognize that no direct evidence was introduced that William would qualify for a government loan, and do not base our holding on his ability to do so.

[7] We find it important that the trial court's order did not forbid Daughter from taking out loans, and did not rule out the possibility of Daughter taking out loans in the future or to cover expenses in excess of those estimated by the parties. Cf. Quinn, 858 N.E.2d at 672 (directing the trial court, on remand, "to reconsider its absolute prohibition against [the child] taking out any loans to help pay for her education at a private school").